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IN THE

Supreme Court of the United States

OCTOBER TERM 1948

No. 676

FRANK BAILEY, *et al.*,

Intervenors-Petitioners,

—v.—

EDWARD O. PROCTOR, *et al.*,

Receivers.

ON APPLICATION OF RECEIVERS AND ATTORNEYS FOR ALLOWANCES

PETITION FOR CERTIORARI

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GEORGE TROSK,
MILTON S. GOULD,
HENRY M. LEEN,
of Counsel.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT, AND SUPPORTING BRIEF

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners, by Jesse Climenko, their attorney, pray that a Writ of Certiorari issue to review an order of the United States Court of Appeals for the First Circuit rendered January 17, 1949. The order referred to affirms an order of the United States District Court, District of Massachusetts, which (1) grants the receivers of Aldred Investment Trust a final allowance of $170,000 in addition to $75,000 theretofore awarded them, and (2) grants Putnam, Bell, Dutch & Santry, Esqs. $18,000 for legal services rendered to Aldred prior to receivership, and to the attorney for the receivers during the receivership,

in connection with the defense of an action brought against Aldred by John J. Murphy.

Jurisdiction

The basis of jurisdiction is Section 240 of the Judicial Code.

Summary Statement of Matters Involved

Aldred Investment Trust (hereinafter referred to as "the Trust") is a Massachusetts Trust organized in 1927.

Prior to its liquidation, hereinafter referred to, the Trust had outstanding 171,500 shares and $5,900,000 of 4-1/2% debentures due in 1967.

In May 1944, the Securities and Exchange Commission commenced a proceeding for the appointment of a receiver of the Trust and to enjoin Hanlon, then President of the Trust, and his associates from continuing to serve as officers and trustees, on the ground that they had been guilty of gross misconduct and gross abuse of trust.

After trial, the learned District Court found Hanlon and his associates guilty as alleged in the complaint, enjoined them from continuing to act, and appointed Edward O. Proctor, Esq., an attorney at law, and Edward F. Goode, Esq., an employee of a stock exchange house, receivers of the Trust (58 F. Supp. 724; aff'd 151 F. 2d 254; cert. denied 326 U. S. 795).

While the Trust was in receivership, petitioners, by bona fide purchase, acquired approximately 65% of the issued and outstanding stock of the Trust and $79,000 face amount of its debentures. Subsequently, by order of the Court, petitioners were permitted to intervene in the proceeding.

The assets of the Trust in receivership consisted exclusively of stocks, bonds and cash. The securities were sold

by the receivers pursuant to Court order. The holders of debentures were paid the full face amount of their debentures, with accrued interest. Shareholders were given the option to turn in their shares and receive the liquidation value thereof, or to continue as shareholders of the Trust. All those who did not elect to remain with the Trust have been paid the full liquidating value of their shares; the others remain the only shareholders, and the assets representing the liquidating value of their shares constitute the entire corpus of the Trust.

The receivers were appointed Jan. 19, 1945. By September, 1946, all the securities in the portfolio had been disposed of, with two minor exceptions (R. 12). From then on the receivers had no substantial duties to perform except to hold the Government bonds in which the proceeds of the sales were invested, and to distribute as directed by the Court. Thus the active period of the receivership did not last longer than twenty months.

In the course of the receivership, the receivers were allowed, *ex parte*, $75,000 on account of their compensation By the order now sought to be reviewed, they have been allowed an additional $170,000, bringing their total compensation to $245,000 (R. 21-22).

The Trust, to protect its interest in Eastern Racing Association, Inc., of which it was controlling stockholder, had Mr. Goode, one of the receivers, elected Treasurer of the Racing Association. He acted as such for about thirteen months during the receivership, for which he was separately paid at the rate of $25,000 per annum by the Racing Association (R. 22).

By the order now sought to be reviewed, the law firm of Putnam, Bell, Dutch & Santry, Esqs. (hereinafter referred to as "the Putnam firm") have been allowed $18,000 for services prior to and during the receivership in the defense

of an action brought against the Trust by John J. Murphy.

In the course of the receivership, the District Judge made other allowances to attorneys aggregating $119,000.

Thus, in a receivership which did not involve the carrying on of a business, but only the sale of a portfolio of securities, the reinvestment of the proceeds in Government securities, and distribution, the learned District Judge has made allowances of $245,000 to the receivers and $137,000 to others, a total of $382,000. These, if permitted to stand in full, with the other expenses of administration, would bring the administrative costs of the receivership to approximately $450,000.

The Questions Presented

1. May allowances of $263,000 be made upon a statement of services so meager and so indefinite that the District Judge must have based them, as he indicated he would, on matters not shown by the record; or must allowances be based, as all other decisions in judicial proceedings must be based, on facts appearing in the record so that an Appellate Court may make an intelligent review?

2. The statement of services furnished by the receivers—vague and incomplete as it is—lumps services for the receivership and services not for the receivership, and the time expended is given only in gross for all the services combined. May such a statement be accepted as a basis for fixing allowances to receivers?

3. Treating Mr. Proctor's statement of the time spent—1217 hours—as if all of it were devoted by him to the receivership (although his own statement recites that a substantial part was not), the allowance to him of $122,500 is

at the rate of more than $90 per hour. May such an allowance stand?

4. To protect the Trust's interest in Eastern Racing Association, Inc., of which the Trust was the controlling stockholder, the receivers had Mr. Goode, one of the receivers, made Treasurer of the Racing Association, and the Racing Association paid him, as its Treasurer, at the rate of $25,000 per annum for thirteen months during the receivership. Should not this income have been credited against any commissions payable to him as receiver?

5. There is nothing in the record to show on what basis receiver Goode has been compensated. All we know is that he was an "employee" of a stock exchange house up to the time of his appointment; that the receivership did not take his full time; and that during the same period he received upwards of $25,000 from Eastern Racing Association. Is an allowance of $122,500 to Mr. Goode permissible in these circumstances?

6. The Putnam firm has been awarded $18,000 for legal services. All there is in the record on the subject is the statement of Mr. Proctor, one of the receivers, that prior to receivership the Putnam firm represented the Trust in the *Murphy* case; that that case took five days for trial; that during the receivership a member of the firm assisted Mr. Proctor in preparing findings and a brief in that case, and that the firm did "a considerable amount of work." May an allowance of $18,000 so be granted on such a showing?

The Reasons Relied on for the Allowance of the Writ

1. It is submitted that this Court should disapprove the making of allowances of $263,000 on a record which contains no factual basis for them and from which the justification for the amounts awarded could not be reviewed intelligently by an Appellate Court.

2. Allowances in substantial amounts should not be made on a statement of services (even if, unlike the one here, it were clear and full) which bulks services performed for the receivership with substantial services which were not, and in which the time spent is given only for all the services combined.

3. The allowances are shockingly excessive.

Mr. Proctor has been allowed compensation at a rate in excess of $90 per hour on his own statement of the time spent, which includes time spent on matters not compensible by the receivership estate.

The rate of compensation to Mr. Goode for services to the receivership cannot be computed because (a) he has been allowed for receivership as well as non-receivership services, and (b) the time spent is not shown either for all the services or for the portion thereof performed for the receivership.

The Putnam firm has been awarded $18,000 upon only the vaguest statement of the services performed by them.

4. Since Mr. Goode was made Treasurer of Eastern Racing Association by virtue of the Trust's stock-control of the Racing Association, and in order to protect receivership property, the compensation he received from Eastern Racing Association—$25,000 per year—should have been credited against the commissions earned by him as receiver.

5. It was reversible error for the learned District Judge to refuse to permit petitioners to introduce proof concerning the services performed by the receivers, the time spent by them thereon, and other circumstances which would bear upon what a reasonable allowance would be.

6. Whether or not the allowances here made shall stand, important as the determination of this question is to the litigants in this proceeding, raises questions of great importance in the administration of receiverships generally; and in the interest of settling the principles involved for the guidance of the bench and the bar throughout the nation, it is respectfully submitted that a Writ of Certiorari should issue.

POINT I

Allowances aggregating two hundred and sixty-three thousand dollars have been made on a record so meager and so vague that the amount can be justified, if at all, only on the assumption that the learned District Judge based the awards on information not appearing in the Record.

If allowances so made may stand, the safeguards of hearing on notice and right to review on appeal become worthless.

Allowances to equity receivers are in the sound discretion of the Court (*Central Trust Co.* v. *Wabash, St. L. & P. Ry. Co.*, 32 Fed. 187, 188 (C. C. E. D. Mo., 1887)).

> "in the sense that there are no fixed rules to determine the proper allowance, and is not discretionary in the sense that the courts are at liberty to give anything more than a fair and reasonable compensation."

Equally well established is the doctrine that orders of the District Court granting allowances are appealable: where District Courts have allowed more than "fair and reasonable compensation", the Appellate Courts have not been hesitant to reduce the allowances (*City of New Orleans* v. *Malone,* 12 F. 2d 17 (C. C. A. 5, 1926); *Walton N. Moore Dry Goods Company* v. *Lieurance,* 38 F. 2d 186 (C. C. A. 9, 1930); *Newton* v. *Consolidated Gas Company,* 259 U. S. 101).

But if the right to be heard, and to a review on appeal from an allowance deemed excessive, is to be something more than an empty phrase, if it is to be any kind of protection against error, the basis and justification for allowances must be found in facts appearing in the record; they may not be sustained on the theory that, although unsupported by the record, there may have been an adequate basis in facts known to the Court below, but not in the record. This is so inherent in the very nature of a review on appeal under our jurisprudence, and so patently essential to the administration of justice as we understand it, that any further discussion of the point would seem supererogatory.

Not only is the record insufficient to support the substantial allowances made here, but the learned District Judge made it quite clear that, in fixing the amount of the allowances, he did not feel bound to limit himself to the record facts, and felt free to base his award on information acquired by him from sources outside the record (R. 35, 47).

Turning to the proof which is in the record, we find only general statements that there were "conferences", "negotiation" and "study"; that matters were "discussed", "explored" and "investigated", and that there was "much paper work"; also that securities in the portfolio were sold

from time to time pursuant to Court order (R. 11), and that there were "other matters", such as the making of reports, correspondence and the consideration of "numerous legal problems" (R. 18). All these services are referred to in the most general terms; in no instance do the receivers give any details or state how much time was spent.

Mr. Proctor, who acted as attorney for the estate in receivership as well as receiver, has given a Statement of the legal services performed by him, all of which is included in the services for which he has asked and been allowed compensation (R. 16-17).

Mr. Proctor's Statement of legal services shows that he appeared in the District Court on ten occasions in support of, or in opposition to, motions; that he appeared in the Court of Appeals on two days, and collaborated in the writing of briefs on these two matters.

Of the ten appearances in the District Court, Mr. Proctor admits that two related to motions concerning which the receivers were "neutral" (R. 17); some of the others likewise related to matters in which the receivers should have remained neutral (R. 16-17).

The only other legal service performed by Mr. Proctor was the preparation, "with Mr. Bancroft's assistance", of the findings in *Murphy* v. *Hanlon* (R. 15). Mr. Bancroft was an associate of the Putnam firm (R. 14), who have been allowed $18,000 for their services in the *Murphy* case. Mr. Proctor spent "practically [a] full day" arguing the *Murphy* case in the Superior Court; he collaborated with Mr. Bancroft in preparing a brief, and he argued the case before the Full Court (R. 15).

As far as Mr. Goode is concerned, the record furnishes no evidence of the basis upon which the allowance to him was determined. The services performed by Mr. Goode are stated in the most general terms (*infra*, pp. 13-14), and for these he has been allowed $122,500 in addition to upwards

of $25,000 which he received during the period of the receivership for acting as Treasurer of Eastern Racing Association—an office to which he was elected by virtue of the stock control of the Association by the Trust, and for the purpose of protecting a Trust asset.

We know only that up to the time of his appointment as receiver, Mr. Goode was an "employee" of a stock exchange house (R. 19); that from at least September, 1946, when only Eastern Gas and Fuel stock remained in the portfolio, "the affairs of the Trust were not a full time job" and required "on the average of about one-half of each working day" (R. 20).

Insofar as the allowance of the $18,000 to the Putnam firm is concerned, there is no proof in the record as to the nature and extent of their services, beyond a reference to their having been counsel to the Trust in the *Murphy* case, in which five days were occupied in trial and taking of evidence (who tried the case and who took the evidence is not stated), and the preparation by one of the firm's associates of findings and a brief (R. 15). The record contains but one other reference to the services performed by the Putnam firm: the oral statement of Mr. Proctor that the Putnam firm "did a considerable amount of work" before the receivership and that there were "conferences" between Mr. Proctor and one of the members of the Putnam firm (R. 34).

The defect in the proof of the services performed by the Putnam firm affects the allowance to Mr. Proctor, because his allowance includes services in the same case and the need and value of the services performed by each cannot be intelligently estimated without knowing what was done by the other.

Thus we have allowances aggregating $263,000 upon a record which is palpably insufficient to justify such substan-

tial amounts. The deficiency, if cured at all in the mind of the District Court, must have been cured by his reliance upon information not in the record, upon which he said he would rely (R. 35, 47).

If allowances may be made and sustained upon matters not in the record, the right to hearing on notice before they are made, and to a review on appeal after they are made, becomes an illusion.

It is submitted that this Court should disapprove the making of substantial allowances on any basis other than facts appearing in the record from which the justification for the amount awarded may be intelligently reviewed by an Appellate Court; that this record is, as a matter of law, insufficient to justify the allowances which have been made, and the order making them should therefore be reversed.

POINT II

The statement of services furnished by the receivers, for which they have received their allowances, lumps receivership services and substantial services not compensable out of the receivership estate. The time expended is given only in gross for all the services combined. Such a statement may not be accepted as a basis for fixing allowances.

Moreover even if the time stated had been devoted exclusively to receivership matters, the rate of compensation would still be far in excess of any recognized or approved standard, the rate to Mr. Proctor, being in excess of $190,000 per year, and to Mr. Goode in excess of $50,000 per year.

We have discussed above the insufficiency of the record proof of services performed by the receivers.

We have, however, Mr. Proctor's statement that the total time devoted by him was 1217 hours (R. 20). If the amount allowed him—$122,500—were to be divided by this number of hours, the rate of compensation would be upwards of $90 per hour, or more than $190,000 per year—a sum in excess of a reasonable amount by any recognized standard. But the true hourly rate of compensation is much larger than would result from a division of the amount allowed by 1217. In the first place, not all of the 1217 hours were devoted to the receivership. Mr. Proctor gives this figure as the number of hours he spent (R. 20) "including [the time spent on the affairs of] Eastern Racing Association". The amount of time devoted to the affairs of Eastern Racing Association is nowhere stated, but promptly after the receivership Mr. Proctor became chairman of the board of directors of that corporation (R. 8) and also its general

counsel (R. 20), and the services rendered by him to the Racing Association during the period of the receivership were varied, substantial and time-consuming (R. 7-9). If the time devoted to the Racing Association's affairs be deducted from 1217, the number of hours for which $122,500 has been allowed would be reduced accordingly, and the rate of compensation increased accordingly. Furthermore, the 1217 hours is not all Mr. Proctor's time; it includes, as he states (R. 20), "160 hours spent by other men in the office assisting Mr. Proctor on the Aldred Investment Trust matters". Who these "other men in the office" were—whether juniors or seniors or only clerks—and what their rate of compensation was, does not appear. It is only fair to assume, however, that these "other men in the office" who merely "assisted" Mr. Proctor, would not be compensated by Mr. Proctor for their services at as high a rate as he reserves for himself. To the extent that their rate of compensation is less than Mr. Proctor's, the amount remaining for Mr. Proctor is further increased.

Thus, insofar as Mr. Proctor's services are concerned, the record contains no statement of the time spent by him on receivership matters, and even on the basis of the time spent by him on receivership and non-receivership matters combined, the allowance to him is at a rate substantially in excess of $90 per hour or $190,000 per year.

Mr. Goode has not favored us with any statement of the time he devoted to receivership affairs. All we know about him is that prior to his appointment as receiver he was an "employee" of a stock exchange house (R. 19); that he participated in "conferences" and made "investigations", and evidently supervised the paper work in connection with the receivership; that, with two exceptions, all of the securities constituting the portfolio of the Trust, were disposed before September 1946 (R. 12); whether or

not the receivership occupied Mr. Goode's full time up to that date we do not know, but we do know that from then on "the affairs of the Trust were not a full time job" and required "on the average of about one-half of each working day" (R. 20). How much, if any, of "about one-half of each working day" was put in by Mr. Goode does not appear.

On this "showing", Mr. Goode has been allowed $122,500 for his services as receiver, in addition to upwards of $25,000 received during the same period from Eastern Racing Association.

It is submitted that from any point of view the amount allowed was grossly excessive.

We have already pointed out (*supra*, p. 10), that there is no way of telling from the record how much time the Putnam firm devoted to the affairs of the receivership.

The meager and vague references to what they did (R. 15, 34-35) furnish no adequate basis for the fixing of an allowance; but in any event they demonstrate that the amount allowed is far in excess of recognized or permissible rates of compensation.

In *Guaranty Trust Co.* v. *Seaboard Airline Railway Co.*, 68 F. Supp. 304 (E. D. Va., 1946), the petitioner for allowance alleged without apparent contradiction that "reasonable compensation for a first class New York law firm" is $50 per hour for senior partners and $25 per hour for associates. The District Court allowed compensation at the rate of about $12 per hour.

In re Allied Owners, 79 F. 2d 187 (C. C. A. 2, 1935); cert. den. 296 U. S. 570 was a reorganization proceeding involving an estate of more than $18,000,000. The Court, in reviewing the propriety of an allowance to counsel for the trustees, wrote:

> "* * * These and many other important matters, such as litigation over the Ringling note, requiring skill and experience, are said to have occupied one or more of the partners in Goldwater & Flynn and two of their legal assistants for some 4,508 hours, of which 3,023 were those of their assistants. Many of the things done by these lawyers, as is always the case, were routine matters; many were matters of large importance; many were of a sort preliminary to the reorganization, which has not yet been completed. We think $50,000 is a reasonable compensation for these attorneys, and we award that amount instead of $75,000, to which is to be added their disbursements of $1,247.80 directed to be paid by the District Judge" (p. 191).

Thus, counsel were compensated at an average rate of $11 per hour.

Investigation reveals no precedent for allowances to either receivers or attorneys for receivers, at a rate in excess of $45 per hour. Even if we apply the established rate charged by first class law firms in New York City to private clients for legal services ($50 per hour for partners' time and approximately $25 per hour for associates' time), the award to Mr. Proctor is inordinately high. The observations of Judge Wilkinson in *Lincoln Printing Co.* v. *Middle West Utilities Co.*, 17 F. Supp. 799 (N. D. Ill., 1936), are singularly apposite:

> "At the outset it is to be observed that, by the course of judicial decision, it is established that those who serve as court officers are not to be compensated on the same basis as those who serve in employment by private corporations. A receiver is not to be paid what the president of a corporation would receive for similar ser-

vices. The receivers' attorneys may not be paid according to the standard of compensation for attorneys for private concerns" (p. 801).

Equally appropriate is the language of Judge Evans in *In re Insull Utility Investments Inc.*, 6 F. Supp. 653, 660 (N. D. Ill., 1933):

"The position of receiver being one of honor and trust, an officer of the court, the incumbent must recognize that a substantial part of his compensation must be found in the opportunity to serve. He has, in other words, joined the ranks of those who are public servants, whose compensation never has been and never will be as large as of those engaged in private employment. His compensation must in some ways be compared to the salary of the judge who was sitting on the bench when the appointment was made. An inquiry into the compensation of the United States District Attorney and the Postmaster is appropriate. The salary of the Chief Justice of the United States Supreme Court may well be viewed as the maximum which should be allowed. These are not the sole tests, but it must be recognized that receivers in the Federal courts are in their nature public officers and their compensation must be determined in the light of such facts. Unless the courts can secure the services of such men and unless courts insist upon the selection of such receivers, the task of meeting a situation such as has confronted them since 1929 may well be surrendered to other bodies.

"Unless the appointee looks upon the appointment as an opportunity for real service, he will not be reconciled to this compensation. But until and unless such a

conception of his position is fully established it seems to the writer that the administration of embarrassed or bankrupt companies in the Federal courts will never be satisfactory."

The learned District Judge in making these allowances has ignored or rejected all of the recognized standards and has indulged in what Mr. Justice Taft denominated "vicarious generosity" (*In re Gilbert*, 276 U. S. 294, 296). He has disregarded the precept stated by Judge Hand in *In re New York Investors*, 79 F. 2d 182, 185 (C. C. A. 2, 1935):

> "The Supreme Court has given notice on more than one occasion that receivers and attorneys engaged in the administration of estates in the courts of the United States and in litigation affecting property within the jurisdiction of those courts, should be awarded only moderate compensation and that many of the allowances heretofore awarded have been too high. • • • These declarations of policy by a tribunal which is controlling upon the lower Courts must be kept constantly in mind in dealing with judicial allowances—a subject difficult and unsatisfactory because of lack of any definite standards."

See also: *U. S.* v. *Equitable Trust Co.*, 283 U. S. 738; *Bailie* v. *Rossell*, 60 F. 2d 806 (C. C. A. 3, 1932); *In re Insull Utility Investments*, 74 F. 2d 510 (C. C. A. 7, 1935); *Trustees Corp.* v. *Kansas City M. & O. Railway Co.*, 26 F. 2d 876 (C. C. A. 8, 1928).

The learned District Judge, in fixing Mr. Proctor's allowance, applied an hourly rate at least twice as high as any justified by authority or experience; and in evaluating Mr. Goode's services he made his determination without any evidentiary basis whatever. We respectfully

submit that these were errors resulting in allowances which are inordinate and excessive and constitute an abuse of discretion. The allowances here justify reference by counsel to the admonition in *Penner* v. *Drilling Development Co.*, 293 Fed. 766, 767 (D. Mont., 1923):

> "It must be remembered, though too often forgotten, that receiverships are not to enrich the incumbents and counsel."

POINT III

Sums paid to receiver Goode by Eastern Racing Association should have been deducted from any allowance to him as receiver.

The record discloses that Mr. Goode acted as Treasurer of Eastern Racing Association from April, 1945 to May, 1946 and that during that period he was paid by Eastern Racing Association at the rate of $25,000 per annum (R. 42). The receivers' statement in support of their application states that it was "In order to insure close supervision of the finances and operation of the track" that the receivers caused Mr. Goode to be elected as Treasurer (R. 8). In short, his activities in Eastern Racing Association were but in furtherance of the receivership. As a matter of law, the compensation received by him from Eastern Racing Association must be considered in determining the amount to be allowed him for services as receiver: *Williams* v. *Morgan*, 111 U. S. 684; *In re New York Investors Inc.*, 79 F. 2d 182, 185 (C. C. A. 2, 1935); *In re Insull Utility Investment*, 74 F. 2d 510 (C. C. A. 7, 1935).

In *Williams* v. *Morgan,* this Court required that salaries paid to trustees and receivers be taken into consideration in the fixing of their allowances.

In the *New York Investors* case, the Court reduced compensation to attorneys for receivers in an amount equivalent to that paid to them for legal services in collateral matters, although the sums paid to them did not actually come out of the estate in receivership.

The services performed by Mr. Goode in connection with Eastern Racing Association were performed, as he himself admits, as part of his administration of the Trust. He says (R. 19) that he "devoted his time exclusively to Aldred Investment Trust, including Eastern Racing Association". He is not entitled, we submit, to retain what he received as Treasurer of Eastern Racing Association, a position he occupied to protect the trust estate, and at the same time be paid in full as receiver of the Trust.

POINT IV

It was reversible error for the learned District Judge to refuse to permit petitioners to show the services performed by the receivers and attorneys, and other matters relevant to a determination of the reaseasonable value of their services, particularly in view of the lack of specifications in the moving petitions.

We have already pointed out that the papers upon which the receivers and the Putnam firm applied for allowances are so vague and meager as to be insufficient as a basis for the determination of the reasonable value of their services.

In this state of the record, the attorney for petitioners offered to prove the services performed by the receivers, the time devoted thereto, and other matters relevant to the determination of what would be a reasonable fee for the

services performed. This proof the learned District Judge refused to receive (R. 47). Similarly, in the case of the Putnam firm, as to which the record is even more inadequate, the learned District Court likewise refused to receive proof of the services performed (R. 35).

In a case where claimants fail to set forth facts justifying the allowances requested by them, it is difficult to see how objectants could have been fairer than to offer the claimants the opportunity to supply the deficiencies, if they could, by testifying to the facts. In refusing to receive this proof, we submit, the learned District Judge committed error which makes the allowances aggregating $263,000 improper.

POINT V

While the standards of compensation fixed by the Bankruptcy Act are not binding upon the District Judge in an equity receivership, they are persuasive and should be given expression. Under these standards the allowances here are at least twice as high as they should be.

We recognize that the standards of compensation fixed for receivers under the Bankruptcy Act are not controlling in equity receiverships. Nevertheless, the services performed, the time required, and the skill involved are not different in the one from the other. Hence, the rates of compensation fixed by law for receivers in bankruptcy cases should be given serious consideration in fixing allowances in equity cases. *Walton N. Moore Dry Goods Company* v. *Lieurance*, 38 F. 2d 186 (C. C. A. 9, 1930); Fletcher on Corporations, Vol. 16, p. 536.

Section 48 of the Bankruptcy Act (11 U. S. C. Sec. 76) provides:

"a. The compensation of receivers appointed under this title, for their services payable after they are rendered, shall be as follows:

(1) As custodians. Receivers appointed pursuant to clause (3) of section 11 of this title who serve as mere custodians shall receive such amount as may be allowed by the Court, but in no event to exceed 2 per centum on the first $1,000 or less and one-half of 1 per centum on all above $1,000 on moneys disbursed by them or turned over by them to any persons including lienholders and also upon moneys turned over by them to the trustees and on money subsequently realized from property turned over by them in kind to the trustee.

(2) With full powers. Receivers appointed pursuant to clause (3) of section 11 of this title who serve otherwise than as mere custodians shall receive compensation by way of commissions upon the moneys disbursed or turned over to any persons, including lienholders, by them and also upon the moneys turned over by them or afterward realized by the trustees from property turned over in kind by them to the trustees, such amount as the court may allow, but in no event to exceed 6 per centum on the first $500 or less, 4 per centum on all in excess of $500 but not more than $1,500, 2 per centum on all above $1,500 and not more than $10,000, and 1 per centum on all above $10,000.

(3) Conducting business. Receivers appointed pursuant to clause (3) of section 11 of this title who conduct the business of the bankrupt as pro-

vided in clause (5) of section 11 of this title, shall receive such amount as may be allowed by the court, but in no event to exceed twice the maximum allowance permitted by paragraph (2) of this subdivision a."

The statutory bankruptcy standards have been applied to corporate reorganizations because of abuses inherent in equity receiverships. It is entirely fortuitous that this proceeding is an "equity receivership" instead of a proceeding under the statute designed to supersede such receiverships. Plainly, there is no reason why compensation in a proceeding such as this should exceed the statutory compensation authorized by Congress under the Bankruptcy Act. The fact is that the Courts quite properly have used the Bankruptcy Act standards as their standards in equity receiverships.

If we apply the standards of the Bankruptcy Act to these allowances, on the assumption that the receivers handled $9,000,000, but did not "conduct" a business, their aggregate compensation would be $90,000 as against the $245,000 allowed by the Court.

A business is "conducted" by receivers within the meaning of the Bankruptcy Act where they carry on at least substantially the usual, customary and normal activities of the bankrupt as a going concern. *In re Duke,* 15 F. 2d 92 (E. D. Mo., 1924); *In re U. S. Products Corporation Ltd.,* 57 F. Supp. 239 (N. D. Cal., 1944). Aldred was an investment trust when it came into the hands of the receivers. The business of an investment trust is the purchase and sale of securities, the collection of dividends, and the distribution of profits, if any. Obviously, the receivers were not permitted to engage in such activities, and

there is no pretense that they did; they merely sold off the assets of the Trust when directed so to do by the Court. *In re Slattery & Co., Inc.*, 294 Fed. 624 (C. C. A. 2, 1923), involved a bankrupt investment company. The Court, in dealing with the precise problem under consideration here, wrote:

> "The receiver did not and could not continue the business above described. It is plain that he could not buy new securities nor invest the securities which came into his hands, and of necessity the 'partial payment plan' could not be continued by the receiver in the manner conducted by a going concern" (p. 627).

The decision affirmed an order of the District Judge denying double commissions, where the District Judge wrote:

> "His [the receiver's] activities were directed to the preservation of the assets, and in reducing some of them into cash. The mere incident that the assets largely consisted of stocks and bonds, which, by reason of their hypothecation as security for loans of the bankrupts, necessitated careful handling and a method of procedure differing from that usually employed in bringing about liquidation, does not differentiate the case from a liquidation in which the assets are disposed of in ordinary course" (p. 625).

Even if the receivers were entitled to be compensated according to the standards established in sub-section (a) (3) of Section 48 of the Bankruptcy Act, on the theory that they were engaged in "conducting" the business of Aldred, their aggregate compensation could not exceed $180,000 (less deductions for moneys received from Eastern Racing Association), as against the $245,000 allowed by the Dis-

trict Judge. Moreover, even a receiver who conducts a business is not automatically entitled to the rate specified in sub-section (a) (3); this section merely fixes the *maximum*. Here the allowance is $65,000 beyond the permissible maximum to receivers in bankruptcy who conduct the business, although there is no basis for applying any standard but the lower standard applicable to receivers who are merely "custodians".

The authorities are clear that the aggregate compensation to receivers may not be increased because there is more than one. (*In re Mills Tea & Butter Co.*, 235 Fed. 813 (D. Mass., 1916); *In re Luna Amusement Co.*, 6 F. Supp. 838 (E. D. N. Y., 1934).)

POINT VI

The suggestion in the petition for allowance that the receivers' compensation should reflect their acumen in bringing the estate out of insolvency is misleading. To the extent the transition was due to the sale of Eastern Racing Association stock at a huge profit, the credit is due to petitioners and not to the receivers, and as far as the sale of the remaining assets is concerned, the advantageous prices received were, as the Court of Appeals has previously held herein, the result of "mere chance" and "post-war stock market inflation."

The learned District Judge apparently predicated the allowance of $245,000 to the receivers upon their supposed accomplishment "in converting a deficit of $2,300,000, into an equity of substantially $1,800,000" (R. 31).

When petitioners first appeared in this matter in January, 1946, the stock of Eastern Racing Association—the principal single asset of the Trust—was being traded in

small lots at about $120 per share, or a hypothetical value for the entire block owned by the Trust of approximately $1,800,000. On January 29, 1946 at a confernce in the chambers of the District Judge, the receivers did not question the view expressed by the District Judge that $1,500,000 appeared to be the best price obtainable for the block of the Racing Association stock owned by the Trust. Not until the memorandum prepared by petitioners* on the subject of Eastern Racing Association, Inc., indicating a market value of at least $200 per share, was widely circulated by petitioners did the market reflect this value. It was, in fact, only because the petitioners concluded that the Eastern Racing stock had a value in excess of $200 per share that they bought the controlling stock of Aldred; it was this conclusion, ably elucidated and amply documented in said memorandum, and widely circulated by petitioners among persons who might be interested in acquiring the stock, which resulted in the increase in the market value of the stock from approximately $120 per share on January 17, 1946 to $240 per share on April 17, 1946, and in its sale for $3,600,000, or $2,100,000 more than its assumed value before petitioners interested themselves in creating a market for the stock at a fair price.

As for the explanation of the increase in the value of the other securities in the portfolio of the Trust, see *Bailey* v. *McLellan,* 159 F. (2nd) 1014 (C. C. A. 1, 1917), another phase of this case, in which the Court of Appeals said:

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* This memorandum is reproduced in the Transcript of Record in *Bailey* v. *Proctor* (another phase of this case), at pages 79 to 83 inclusive. The said Transcript of Record is incorporated in the Transcript of Record on the instant appeal, by reference (R. 56). A reading of the earlier Record emphasizes that prior to the sale of the Eastern Racing Association stock, it was the petitioners alone who insisted that the stock had a value far beyond its then market price. The attitude of the Receivers on this point is best indicated by their concurrence in the view of the learned District Judge that $1,500,000 appeared to be the best obtainable price.

> "The fact that the market for securities rose during this protracted period and that the sale of the Racing Association stock was an advantageous one, was mere chance * * *" (p. 1017)

and *Bailey* v. *Proctor*, 160 F. 2nd 78, 83 (C. C. A. 1, 1947), still another phase of this case, in which the Court of Appeals recognized that the doubling in value of the securities was "due to a post-war stock market inflation."

The sale of these securities in June and July of 1946 was a consequence of the order of June 19, 1946 directing liquidation. It did not reflect a premonition on the part of the receivers that in September, 1946 the market would experience a violent recession.

Certainly, there is nothing in this record which evidences so vast an accomplishment on the part of the receivers as to justify the abandonment of every recognized principle of compensation in judicial proceedings, and to compensate the receivers at a rate which exceeds all standards recognized and followed by the Courts.

CONCLUSION

The petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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